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PRIVY COUNCIL REPORTS

LI TSE SHI v. PONG TSOI CHING

[P.C. (Lords Atkin, Tomlin and Russell of Killowen) October 10, 1935]

[Privy Council Appeal No. 6 of 1935]

Estoppel — Owner of property acquiescing in third person making a fraudulent transfer of the property — Disposal of the property by third party — Real owner estopped from asserting his title to the property against the transferee.

If the owner of property invests a third person with apparent ownership and right of disposition thereof, he is estopped from asserting his title as against a person to whom the third party has disposed of the property and who took it in good faith and for value.

L. W. N. who was the owner of a Crown lease of certain premises, died leaving surviving him a widow L. T. S. and an adopted son L. K. L. By his will the deceased bequeathed the said premises together with other property to the widow absolutely. Some years later L. K. L. fraudulently caused the premises to be transferred to himself from the testator. The transfer was duly registered in the Hong Kong Land Registry. The Courts below found that the widow had full knowledge of the fraudulent transaction. L. K. L. thereafter mortgaged the property in favour of Y. P. Not being in possession of the title deeds to the property, L. K. L. had previously made a statutory declaration to the effect that the deeds were lost. The interest due under the mortgage having fallen into arrear, the mortgagee put up the property for sale by public auction. The property was purchased by one P. T. C. Subsequently letters of administration with will annexed of the estate of L. W. N. were granted to the widow, who issued a writ claiming, *inter alia,* declarations that the premises were vested in her as administratrix and sole beneficiary under the will, that the mortgage was null and void and that the purchaser, P. T. C. had no title to the premises.

Held: that L. T. S. authorised the creation of the deed of assignment to L. K. L. and its entry on the Land Register. That was, in effect, a statement to the world, intended to be acted upon by any one desirous of acquiring an interest in the property, that L. K. L. was the owner of the property as a purchaser for valuable consideration from L. W. N. Y. P. the purchaser acted upon L. T. S.'s statement as she intended he should, and advanced his money on the faith of it. L. T. S. was therefore estopped from asserting against him that L. K. L. was not the owner of the property as a purchaser for value from L. W. N.

On these grounds the action was not maintainable.

Rimmer v. *Webster,* [1902] 2 Ch. 163 relied on.

PRIVY COUNCIL — from the Supreme Court of Hong Kong.

W. P. Spens, K.C. and *H. G. Robertson* for the appellant.

J. M. Gover, K.C. and *W. N. Hunt* for the respondent.

Cur. Adv. Vult.

The judgment of their Lordships was delivered by —

Lord Russell of Killowen: This is a very peculiar case depending in large measure on its very peculiar circumstances, which must first be stated.

One, Li Woon Nam, died on April 19, 1925 leaving his widow, Li Tse Shi (the appellant), and an adopted son, Li Kai Loy, him surviving. He was the owner of a Crown lease of certain premises (hereinafter referred to as the premises), 73 Bonham Strand West situate at Victoria in the Colony of Hong Kong, which he had acquired from one Ng Yu Hon by an assignment dated October 11, 1924. His name appeared at his death as such owner in the Hong Kong Land Registry, the premises being then in the occupation of the said Ng Yu Hon as sub-lessee.

By his will the premises together with other property were bequeathed absolutely to the appellant. As will appear, no legal personal representative of the testator was appointed until some years after his death. In the meantime a strange transaction had taken place.

On March 24, 1930, an indenture was signed, sealed and delivered, purporting to be an assignment on sale of the premises by Li Woon Nam to Li Kai Loy, in consideration of a sum of 70,000 dollars paid by Li Kai Loy to Li Woon Nam, the receipt of which Li Woon Nam duly acknowledged. The sole witness to this document was a partner in a firm of solicitors known as Deacons. His good faith is in no way impugned. Li Kai Loy had been introduced to him by Ng Yu Hon, and Li Kai Loy had in turn introduced some other man as being the proposed vendor, Li Woon Nam. This man, however he was, came armed with the title deed, viz., a deed of February 19, 1917, vesting the property in Ng Yu Hon, and the assignment of Li Woon Nam. These he left with Deacons. After the matter had been completed Deacons registered this assignment by Li Woon Nam to Li Kai Loy in the Hong Kong Land Registry, and by a letter of April 7, 1930, sent to Li Kai Loy the title deed above mentioned.

Obviously there was something wrong here. Li Woon Nam had been dead for nearly five years. Whatever may have been the reason which prompted the person or persons responsible for bringing this document into existence and recording it in the Hong Kong Land Registry, it is [28] clear that *per se* the assignment was a nullity and passed nothing to anybody. For the purposes with which their Lordships are concerned, however, it is crucial to know whether the appellant was in any way, and to what extent responsible for the transaction and at this point the findings of fact by the Courts in Hong Kong are of vital importance.

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The trial Judge found that "contemporaneous knowledge of the impersonation" of Li Woon Nam had been brought home to the appellant. The full Court of Appeal, having had the advantage of some further evidence, took the same view. From these concurrent findings their Lordships see no reason to dissent. The case falls to be decided accordingly upon the footing that the appellant (who was by virtue of her husband's will and possession of the title deeds in command of the situation), procured the premises to be apparently conveyed into the name of Li Kai Loy as on a sale to him by Li Woon Nam, and entries to be made in the Hong Kong Land Registry, representing that Li Woon Nam had, on March 24, 1930, sold and conveyed the premises to Li Kai Loy in consideration of a price of $70,000.

The rest of the story now remains to be told. In the following year Li Kai Loy proceeded to raise money on the security of the premises. The title deeds meanwhile had found their way, for some reason or other, into the possession and custody of one Wong Wa Kong, who was the father-in-law of Li Kai Loy, being thus unable without outside consent, to produce the title deeds to an intending mortgagee, made a statutory declaration on April 13, 1931, in regular form under the Act, explaining the reason for the non-production of the title deeds. Therein he stated that while travelling from China to Hong Kong with the title deeds in his suit case, his suit case had been stolen and the title deeds had been lost. This statutory declaration was entered in the Hong Kong Land Registry on April 13, 1931. On the same day Li Kai Loy executed a full power-of-attorney in favour of one, Li Hip Loy, a nephew of Li Woon Nam.

Later in the same month Li Hip Loy produced the statutory declaration and the power-of-attorney to a firm of solicitors, Messrs. Wilkinson and Grist, whom he instructed to prepare a mortgage of the premises in favour of one Yan Pun. This was done and on April 20, 1931, a mortgage of the premises in favour of Yan Pun was executed by Li Kai Loy by his attorney, Li Hip Loy, to secure the repayment of a principal sum of $65,000 and interest. This was duly entered in the Hong Kong Land Registry. The interest which was payable monthly, was not paid and the mortgagee on July 23, 1931, put the premises up for sale by auction in exercise of a power of sale contained in the mortgage. Ng Yu Hon tried to stop the sale alleging what was not the fact, that either the mortgage or the power-of-attorney had been forged. The auction proceeded, and the premises were purchased by the respondent, Pong Tsoi Ching, for the sum of $77,000. The conditions of sale stipulated that the title should commence with the mortgage, and that no objection should be raised by the purchaser to the non-production of any earlier title deeds. The purchase was completed and the premises were conveyed to the purchaser by an indenture dated August 6, 1931, and made between Yan Pun of the one part and Pong Tsoi Ching of the other part.

On December 4, 1931, letters of administration, with the said will annexed, of all and singular the personal estate and effects of Li Woon Nam, were granted to the appellant, she having given security for payment of estate duty in respect of No. 73 Bonham Strand West.

On December 15, 1931, she issued a writ against Pong Tsoi Ching as sole defendant claiming as administratrix (amongst other relief) declarations (1) that the premises were vested in her as administratrix and sole beneficiary under the will, (2) that the mortgage was null and void and had no legal effect, and (3) that the defendant had no right in or title to the premises. The action was dismissed by Wood J. and an appeal from his judgment was dismissed by MacGregor C.J. and Lindsell J. Upon the facts as narrated above, it is not easy to see how any other result could have ensued.

It is to be observed that the action is based upon the view that nothing passed by the assignment to Li Kai Loy, and that accordingly nothing passed by the mortgage to Yan Pun, or by the assignment to the respondent. It appears to their Lordships that the question which calls for decision at the outset, is the question whether the mortgage to Yan Pun was effectual as against the appellant to vest the premises in him as mortgagee. If it was, no attack can be effectively made on the respondent's title. He can be in no worse case than the mortgagee. If any invalidity existed in the title of the mortgagee, the title of the respondent might conceivably be a better one. This position is recognised by the appellant who in her pleadings, by the reply, alleged actual or constructive notice by the respondent of infirmity of title, but it was properly conceded at the argument before the Board that if Yan Pun had acquired a good title the appeal must fail; for be it noted the appellant's claim is not coupled with any offer to redeem the mortgage, or the respondent as standing in his shoes. It is solely a claim on the footing that nothing passed to the mortgagee.

In their Lordships' opinion this claim is upon the facts of this case, an ill-founded claim. The [29] appellant authorised the creation of the deed of assignment to Li Kai Loy, and its entry on the Hong Kong Land Register. This is a statement (authorised by her), and a continuing statement to the world intended to be acted upon by any one desirous of acquiring an interest in the premises, that Li Kai Loy is the owner of the premises as a purchaser for valuable consideration from Li Woon Nam. The evidence shows that before advancing the money the mortgagee, through his solicitors searched the register and relied upon the title as therein disclosed; in other words, Yan Pun acted upon the appellant's statement, as she intended he should, and advanced his money on the faith of it. In these circumstances the appellant is estopped from asserting against him that Li Kai Loy was not the owner of the premises as a purchaser for value from Li Woon Nam. The title of Yan Pun as against the appellant was accordingly complete and valid. It follows that as against her the title of the respondent is equally unimpeachable. [29]

A recent judgment of the Board is not without relevance here. In a case, which also dealt with registration in the Hong Kong Land Registry *Tsan Chuen* v. *Ki Po Kwai,* [1932] A.C. 715; 101 L.J.P.C. 193, this Board used the following language: "To their Lordships it seems clear that by his registration of the memorial of his deed of assignment, the respondent is estopped as against the appellant who took his mortgage in reliance on the memorial from denying its correctness in any essential particular." So here it may properly be said that the appellant by authorising the registration of the memorial of the deed of March 24, 1930, is estopped as against Yan Pun (and, therefore, the respondent) from denying that Li Kai Loy was the owner of the premises, having bought them from Li Woon Nam for the sum of $70,000. As Farwell J. stated in *Rimmer* v. *Webster,* [1902] 2 Ch. 163 at p. 173; 71 L.J. Ch. 561; 86 L.T. 491; 50 W.R. 517, "if the owner of property clothes a third person with the apparent ownership and right of disposition thereof, not merely by transferring it to him but also by

acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who took it in good faith and for value.....If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfer property, 'he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity,' and he cannot be heard to say that he has not in fact received such purchase money."

In their Lordships' opinion the principle underlying this passage is equally applicable to the present case, in which the beneficial owner of the premises has represented that some one else, being the owner thereof, has assigned them to a third person in consideration of a sum of money paid by the third person to and received by the alleged assignor.

It was argued, however, that no estoppel grounded on any representation made by the appellant before she took out letters of administration could bind her as administratrix; and certain authorities were cited in support of that proposition. Whatever true position might have been had she been suing to recover the premises for the benefit of persons other than herself, the present case is not that case. Her husband has been dead many years, there is no suggestion of any outstanding debts for the payment of which the premises have to be realised or indeed of any outstanding debts at all; provision has been made by security for the payment of the estate duty; the only person concerned in the recovery of the premises, or interested in asserting the falsity of her representations, is the appellant herself. In these circumstances their Lordships feel no doubt that she is effectually bound by estoppel.

It was further suggested that Yan Pun was in some way affected with notice of the lack of title in Li Kai Loy from the absence of the title deeds, and from the fact that, as appears from the evidence, Yan Pun was warned that he ran some risk in lending money on mortgage of property without obtaining the title deeds. The risk which he ran was the risk of some adverse title being or having been established which originated in a deposit of those deeds with some third party for valuable consideration. This was a risk which he might run if he chose, and one the existence of which in no way suggested or implied any flaw in the title disclosed by the entries in the register. He was, their Lordships think, entitled in the circumstances to rely on the statutory declaration, which was entered on the register, as a true explanation of the reason why the title deeds were not forthcoming and also if he thought fit to run the risk indicated above. That risk did not in fact mature for the appellant's claim is not founded on possession of the title deeds.

For the reasons appearing herein their Lordships are of opinion that this appeal fails and should be dismissed; and they will humbly advise His Majesty accordingly. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors: *Darley Camberland & Co.; Sharp Pritchard & Co.*

[30] STEAMER "PHILIP DODGE" v. DOMINION BRIDGE CO., LTD. & ORS. [30]

[P.C. (Lords Atkin, Tomlin, Russell of Killowen, Alness and Sir Sidney Rowlatt) July 30, 1935]

[Privy Council Appeal No. 24 of 1935]

Collision — Alleged negligent helm action — Negligence not pleaded nor raised at trial — No trace of plea in judgment — Practice — Whether new plea that negligence is presumed from circumstances of case can be raised on appeal.

In a case of collision in which negligent helm action was imputed to the navigating officer, the plea of negligence was not set up in the pleadings nor raised at the trial. The evidence adduced did not support such a plea although the opposite party had an opportunity of cross-examining the witnesses on the point, nor was it discernible in the judgments of the lower Courts.

Held: that a new plea that negligence was presumed from the circumstances of the case could not be raised on appeal.

The judgment of their Lordships was delivered by —

Lord Atkin: This is an appeal from the judgment of the President of the Exchequer Court of Canada dismissing an appeal from the local Judge in Admiralty for Quebec in favour of the plaintiffs, the present respondents. The respondents are the builders and owners of a bridge across the York River at Gaspe in the Province of Quebec. The claim in the action is based upon the allegation that the defendant vessel when passing under the bridge collided with it and carried away one of the bascules owing to the negligent navigation of those on board. Of the fact of the collision and of the damage there is no dispute. The question arises on an issue of negligence. The bridge, which was in the course of construction at the time of the collision, connects Gaspe Harbour with Gaspe village, running about north and south over a distance of about 770 feet. It consists of four spans and what is called in the proceedings a draw fitted with two bascules which are raised for the passage of ships. On the day in question, 6th July, 1932, the bridge had not been completed: the northern bascue alone had been fitted and was in operation. The defendant vessel, the *Philip T. Dodge,* is a single-screw steamship 5,047 tons gross and 3,691 tons net register, 400 feet in length with a beam 51 feet 7 inches. Her speed is 9½ knots. She was proceeding in ballast to a wharf on the west or upper side of the bridge lying on the south side of the harbour: her draft was 9 feet 10 inches forward and 14 feet 9 inches aft. Her master had been in command of her for about 11 years, had taken her into Gaspe several times before: but not since the bridge had been constructed.

The master had arrived in the vicinity overnight: had anchored for the night, and in the morning taking a local fisherman on board as pilot proceeded to his destination. The tide was about an hour and a half after the flood, and was running out, i.e. against the steamer at one knot. Ten minutes before the accident the ship's engines were put at half speed, and in another five minutes at slow. To negotiate the bridge the captain took the wheel himself: he had the chief officer on the bow and the second officer on the poop. The width of the draw was 90 feet: so that on the